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WORKING GROUP REPORT ON COMPETITION POLICY

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FOREWORD

This report is one in a series of publications dealing with the European Single Market being released by the Government of Canada. It reflects the research and analysis of one of the Government's Interdepartmental Working Groups on Europe 1992, established at the request of the Department of External Affairs and International Trade, to assess the measures put into place by the European Community to complete its internal market.

The working groups were asked to analyze the EC legislation pertaining to their area of expertise and assess the potential impact that this legislation will have on the Canadian economy. To complete this task, they have been working in consultation with the Sectoral Advisory Groups on International Trade and with industry associations.

The working groups' reports do not represent the final position of the Canadian Government. They are working documents published to facilitate the Government's consultation with the provinces and the private sector and to disseminate technical information on the European Single Market. Their purpose is to assist Canadian businesses in preparing their own responses to the challenge of 1992.

This report was prepared under the direction of the Europe 1992 Working Group on Competition Policy and Company Law which was chaired first by Harry Chandler, Deputy Director of Resources and Manufacturing, Bureau of Competition Policy, Consumer and Corporate Affairs Canada and then by Val Traversy, Deputy Director of Economics and Regulatory Affairs, Bureau of Competition Policy. Other members of the working group are as follows:

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Readers should note that developments are occuring very quickly as the European Community moves to complete the Europe 1992 initiative. This report reflects available information as of the Fall of 1990.

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EXECUTIVE SUMMARY

Strong competition policy is seen in the European Community (EC) as playing an important role in the Europe 1992 initiative. The rules that this policy provides on competition between companies and the granting of industrial aid by the EC Member States are viewed as necessary for ensuring that private interests and Member State governments will not be able to undermine efforts to complete the internal market by resorting to anti-competitive private arrangements or government subsidies.

In respect of the role of competition policy in helping to complete the internal market, a number of measures for increasing its effectiveness have been proposed or adopted during the run-up to 1992. These include:

(i) the implementation of the EC Merger Control Regulation in September 1990;
(ii) several measures designed to strengthen the Community's competition policy restraints on the granting of aids (i.e. government subsidies) by the Member States; and
(iii) efforts to promote the development of open and competitive markets in previously highly restricted areas of the EC economy.

Implications for Canadian Businesses

The EC Merger Control Regulation creates extensive new obligations for the notification of concentrations between large companies that meet the Regulation's Community dimension thresholds. The arrangements covered by the Regulation may include not only mergers and acquisitions, but also other arrangements by which effective control of a business may be transferred, such as certain export consortia or joint ventures.

The Merger Control Regulation goes some way toward reducing the uncertainty and costs that, in the past, have been created by the lack of a cohesive Community competition policy on mergers, and overlapping jurisdiction in the merger area between the Member States and the Community. The potential benefits of the Regulation, however, are restricted by features such as:

(i) the use of tight deadlines and extensive information requirements for merger notification;
(ii) the restriction of the automatic application of the Regulation to only very large mergers; and
(iii) the broad scope that the Regulation leaves for overlapping Member State and Community jurisdiction over mergers.

Some features of the Regulation could also result in discriminatory treatment of mergers involving Canadian companies. The criteria for analyzing mergers under the Regulation, and the composition of the EC Commission which applies the Regulation, potentially could allow policy goals that discriminate against Canadian interests to have a significant influence on the assessment of mergers. The true extent of this threat will only become apparent, however, after a number of mergers have been examined under the Regulation.

The efforts being made to strengthen EC competition policy restraints on state aid should help to reduce the potential for Canadian competitiveness in Community markets to be undermined by Member State subsidies. EC industrial aids, however, will remain a major source of concern for some Canadian industries. The Member States will continue to have broad scope to provide industrial aids for a wide range of social, industrial, and research and development objectives that are considered to be consistent with the EEC Treaty. In addition, there is some danger that stricter controls on state aids will be accompanied by increased levels of industrial aid under Community administered programmes.

The measures being adopted for creating more open and competitive markets in previously highly restricted areas of the European economy may benefit Canadian businesses by creating potential EC markets of up to 340 million people. This report, however, like other reports in this series, indicates that Canadian businesses, in order to obtain the greatest benefit from the opening of EC markets, may be required to establish operations in the Community or develop strategic alliances with EC-based companies.

Over the longer term, the attempts being made to establish open and competitive markets in previously highly restricted areas of the European economy, such as telecommunications, financial services and public procurement, are expected to result in substantial efficiency gains in many European industries. As a consequence, many Canadian businesses may come under increasing competitive pressures not only in EC markets, but also in Canadian and other countries' markets.

Public Policy Implications

The development of EC competition policy in relation to the Europe 1992 initiative supports a number of directions for future Canadian public policy.

The promotion of competitive markets in the EC will place greater pressure on Canada to follow outward looking economic policies that are designed to enhance Canadian access to and competitiveness in foreign markets. Inward looking policies that focus on relatively small and fragmented Canadian markets, will be even less effective in the future at generating companies capable of competing successfully in world markets which include increasingly efficient EC competitors.

The developments examined in the report also support the continuing high importance to Canada of trade arrangements such as the GATT and the Canada-U.S. Free Trade Agreement. These arrangements will be necessary in the future to provide Canadian businesses with access to the large markets needed to be internationally competitive.

Similarly, the Europe 1992 initiative emphasizes the importance to Canada of adopting competition, subsidy, research and development, and other policies that promote open and competitive domestic markets. Policies that create unnecessary inter-provincial barriers to trade or allow businesses to unduly restrict competition in Canada will be an even greater handicap to Canadian international competitiveness in the future.

The measures examined in the report reflect the increasing need for public officials and business people in Canada to take account of the negative implications that Canadian legislation and policies may have on Canadian access to EC markets. The potential for reciprocal treatment of Canadian businesses under Community directives and regulations in areas such as merger control, public procurement, financial services and telecommunications, is making their access to Community markets increasingly dependant on Canadian treatment of EC-based companies.

Finally, the report supports efforts by Canadian public officials and the Canadian business community to closely monitor the future development and application of competition and other legislation in the EC, and establish strong cooperative relationships with key public authorities in the EC. These efforts will be necessary to ensure that Canadian interests are adequately represented with respect to the development and future application of competition-related legislation and policy in the Community.

I. INTRODUCTION

Competition policy has traditionally played an important role in the achievement of the objective of the European Community (EC) to create a single "common market" for "the harmonious development of economic activities, continuous economic expansion and a faster rise in the standard of living."[1] The policy is seen within the Community as a strong force for the development of the common market through the control of private restraints of competition within the Community as well as barriers to competition resulting from industrial aid granted by the governments of the Member States. The high importance attached to competition policy for achieving the goals of the EC is reflected in the provisions of the EEC Treaty itself. Article 3 of the Treaty includes, as one of the principle activities of the Community, the establishment of a system which ensures that competition is not distorted. Further to this objective, Articles 85 to 94 of the Treaty outline rules of competition on relations between companies, and the granting of industrial assistance by individual Member States.

The initiative to remove the remaining intra-EC barriers to trade by 1992 has increased the significance attached to the role of competition policy in the development of the common market. In this regard, the 1985 EC Commission White Paper on Completing the Internal Market, stated:

> A strong competition policy will play a fundamental role in maintaining and strengthening the internal market ... As the Community moves to complete the Internal Market, it will be necessary to ensure that anti-competitive practices do not engender new forms of local protectionism which would only lead to a re-partitioning of the market.[2]

The view "that progress towards meeting the 1992 target of a true internal market has made it even more important to have a vigorous and coherent Community competition policy" has also been endorsed by the European Parliament.[3]

In respect of the emphasis that is being placed on competition policy for helping to complete the internal market, a wide range of measures for expanding and strengthening its application in the Community have been put forward since the start of the Europe 1992 initiative. This report examines the potential implications of these developments for Canadian businesses and public policy. Section II of the report provides an overview of the relationship between EC competition policy and the Europe 1992 initiative. Sections III, IV and V examine the potential implications for Canadian businesses and public policy of EC competition policy developments relating to Europe 1992 in three main areas: merger control legislation; the granting of industrial aid by the EC Member States; and the promotion of competition in previously highly restricted areas of the European economy. Section VI provides a Summary.

II. THE RELATIONSHIP OF EC COMPETITION POLICY TO THE EUROPE 1992 INITIATIVE

The nature and role of competition policy in the EC has traditionally been somewhat different than in Canada. In both jurisdictions competition policy establishes rules on competition between private companies. Unlike the situation in Canada, however, EC competition policy also includes rules on the granting of government aid to business. These rules reflect the need for Community policy to deal with the separate industrial, regional, research and development and other policies of the independent Member States that make up the Community. The nature of EC competition policy also differs to some extent from Canada's due to the prominence given to competition policy in the EEC Treaty itself. This has provided competition policy advocates in the EC with a particularly strong basis of support from which to promote the pro-competitive development of Community policy in other areas. Each of these dimensions of EC competition policy has an important relationship with the Europe 1992 initiative.

1. The Community Rules on Competition Between Companies

The primary influence of competition policy on the European Community has traditionally been through the application of Articles 85 and 86 of the EEC Treaty, containing rules of competition for private enterprises. Article 85(1) of the Treaty prohibits agreements or other arrangements between enterprises that may affect trade between Member States and distort competition within the common market. Exceptions to the general prohibition of such practices are permitted under Article 85(3) if the undesired effects of a trade restrictive agreement or practice are counterbalanced by economic efficiency and consumer welfare benefits. Article 86 of the EEC Treaty provides that any "abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States." Practices that may come under this provision include the use by dominant firms of discriminatory or predatory pricing, refusals to supply, unfair trading conditions, output restrictions and other potentially anti-competitive or trade restrictive practices.

Active enforcement of Articles 85 and 86 of the EEC Treaty during the 1960s, 1970s and 1980s has put in place an extensive competition policy framework that underlies the attempt to complete the internal market by the end of 1992. Until recently, however, the treatment of mergers under these Articles remained a major gap in the framework. Much remained to be resolved concerning the responsibilities of the governments of the individual Member States versus the EC Commission with respect to the control of anti-competitive mergers within the Community. As a consequence, parties to mergers having potential implications for trade between the Member States often had to deal separately with competition authorities from the EC Commission and the affected Member States.

The need for a more systematic approach to merger control has long been recognized by the EC Commission and the Member States. Several attempts at establishing a community-wide regulation on this issue were made during the 1970s and early 1980s. However, these attempts failed to resolve major differences between the approaches of the individual Member States toward merger control, or come up with a formula for allocating responsibilities between the Member States and the EC Commission.

The start of the current initiative to complete the common market in 1992 provided renewed impetus to the discussions on merger control in the Community. The development of a merger regulation was not specifically included in the program for finalizing the internal market set forth by the European Commission in 1985. However, the issue obtained high political and economic prominence due to the large amount of cross-border merger activity that took place during the late 1980s, and the continuing disparities among the merger policies of the individual Member States. Increasingly, the development of a merger regulation came to be viewed as a necessary part of the completion of a "Community legal regime which will translate the economic objective of a unified internal market into reality."[4] In response to this concern, the Merger Control Regulation was finally accepted by the Member States in December 1989, and came into effect in September 1990.

2. EC Competition Policy on State Aids

The competitive rules applying to the granting of industrial and other aids by the EC Member States are also seen in the Community as having an important relationship to the Europe 1992 initiative. Article 92(1) of the EEC Treaty generally prohibits the granting of state aid, in any form, that "distorts or threatens to distort competition." Specific exemptions are permitted, however, under Articles 92(2) and 92(3) of the EEC Treaty. These provisions list aid presumed to be compatible with the common market, including, for example, aid of a "social character" granted to individuals, assistance to economically depressed regions, and aid to promote the execution of an important project of common European interest.

Measures for dealing with state aids are set forth in Article 93 of the EEC Treaty. This Article places an onus on the Member States to prenotify the EC Commission of proposed aid programmes or changes to existing aid programmes. If the Commission finds that a proposed aid is incompatible with the common market, it can order that the aid be modified before it goes into effect or be abandoned. If a scheme that is incompatible with the common market has already been put into effect, the Commission can order the relevant Member States to recover any related aid that has been granted.

Strict control of state aids under Articles 92 and 93 is recognized in the Community as highly important for the completion of the common market. In this regard, the 1985 Commission White Paper on Completing the Internal Market stated:

> .... it will be particularly important that the Community discipline on state aids be rigourously enforced ... (state aids) ... not only distort competition but also ... threaten to defeat efforts to build the internal market.[5]

Toward the goal of establishing greater discipline on state aids in the run-up to 1992, the White Paper timetable for finalization of the internal market included a proposal to create an inventory of state aids and a report setting out its policy implications.

The findings of the inventory of state aids, outlined in the First Survey on State Aids released in 1989, and a follow-up survey released in 1990, have led to a major shift in the direction of EC competition policy in this area. In particular, they have resulted in greater emphasis being placed on the control of ongoing aid programmes. In addition, the findings of the inventory have provided the impetus for the adoption, during the run-up to 1992, of a number of other measures to expand and strengthen the competition policy restraints on state aid.

3. Competition Advocacy and Europe 1992

The prominence given to Community competition policy through its inclusion in Articles 3 and 85 to 94 of the EEC Treaty also has a strong relationship to the Europe 1992 initiative. As stated by one expert, these Articles may be viewed as expressing "a norm that markets must be open, that anti-competitive regulations must be narrow, that they ought to be phased out over time, and that they should be subject to constant monitoring."[6] According to this norm, anti-competitive interventions into EC markets by the EC Commission or the governments of Member States should be kept as narrow as possible to allow the open and efficient functioning of the common market.

The importance attached to competition policy within the EEC Treaty has traditionally provided EC competition advocates with a strong basis of support from which to promote pro-competitive regulatory and other reform. The initiative to complete the internal market by 1992 has further buttressed this position. The Europe 1992 goal of creating open and competitive markets has provided competition advocates in the Community with an even stronger basis of support from which to promote deregulatory and other pro-competitive reforms in highly restricted areas of the European economy, such as airlines, telecommunications, financial services and public procurement.

III. THE EC MERGER CONTROL REGULATION

The implementation of the EC Merger Control Regulation is a potentially important development for the ability of Canadian businesses to compete successfully in European and other markets. Mergers, acquisitions and other arrangement that might be affected by the Regulation may provide an effective means for Canadian companies to gain access to expanding Community markets, or consolidate their positions within these markets as the remaining EC internal barriers are lowered. The treatment of mergers under the Regulation may also affect the nature of competition facing Canadian companies not only in the EC, but also in Canada and other countries. In particular, permissive EC competition policy treatment of mergers could lead to the creation of large Community market leading companies as competitors for Canadian businesses.

This section examines these and other issues relating to the EC Merger Control Regulation which came into effect in September 1990. It briefly considers the state of merger control in the Community prior to acceptance of the Regulation in December 1989, and outlines the major provisions of the Regulation and proposed guidelines for its enforcement.[7] In addition, the section examines the potential implications of the Regulation for Canadian businesses and public policy.

1. EC Merger Control Before December 1989

The applicability of EC competition policy to mergers remained a largely unsettled matter in the EC until the 1973 Continental Can decision. In this case, the European Court of Justice established that a merger could constitute an abuse under Article 86 of the EEC Treaty, if as a result of the merger, a business strengthens a dominant position "in such a way that the degree of dominance reached substantially fetters competition."[8] The Court, therefore, supported the prevailing view of the EC Commission, which was that mergers having the effect of monopolizing a transborder market in the EC might be treated as an abuse of a dominant position.[9]

Article 85 of the EEC Treaty has been widely viewed as having more limited potential application to mergers and acquisitions. The EC Commission's position on this issue has been that the Article 85 is applicable only to minority shareholdings and associated relations between competing companies that allow one to influence the competitive behaviour of the other.[10] The decision of the European Court of Justice in the Phillip Morris/Rothman's case, however, has been perceived as having left open the possibility of broader application of Article 85 to merger or acquisition agreements.[11] In this case, the Court upheld an earlier finding of the EC Commission permitting a partial transfer of shares in a company under Article 85. The decision of the Court, however, did not rule out the possible application of Article 85 to transfers of majority as well as minority ownership.[12]

The applicability of the EEC Treaty competition provisions to mergers has allowed the EC Commission to become an important player in merger control in the EC. The Commission, for a number of years, has followed a policy of scrutinizing major mergers and acquisitions taking place within the Community. In addition, firms engaged in large cross-border mergers or takeovers have often attempted to obtain prior clearance from the EC Commission to avoid the threat of intervention by the Commission after completion of the arrangement.

Nevertheless, there remained a number of important obstacles to effective merger control by the Commission. In particular, broad overlap existed between the authority of the Member States and the EC Commission with respect to the control of mergers. With the development of the Commission as an important player in this area, companies often had to obtain separate approval for mergers from both the Commission and the relevant Member States. In addition to increasing the cost of mergers, this often made it necessary for parties to mergers to deal with authorities from two or more jurisdictions, each having a different approach to the analysis of mergers. For example, in order to obtain approval for a merger between British Airways and British Caledonian, the two companies were required to amend their agreement first in response to objections raised by the U.K. Mergers and Monopolies Commission, and later, in response to objections raised by the EC Commission.[13]

Another obstacle to effective merger control by the EC Commission was the lack of clear guidelines on the issue. Consequently, the Commission was not in a position to compel notification of mergers so as to avoid the possibility of having to unravel large, anti-competitive mergers after their completion. In addition, there was no clear guidance regarding the criteria that the Commission should use to analyze mergers. For example, there was no Community-wide consensus on the importance that the EC Commission should attach to alleged efficiencies or industrial policy considerations in its analysis .

2. The Provisions of the Merger Control Regulation

The Merger Control Regulation, implemented in September 1990, represents an important step toward eliminating the above problems. It places certain mergers under the exclusive jurisdiction of EC competition authorities. For these mergers, criteria for assessment are set forth and the powers of the Commission to intervene are established. In addition, the Regulation and proposed guidelines for its application contain extensive notification and other procedural requirements.

2.1 Activity Covered by the Regulation

The coverage of the Merger Control Regulation is not strictly limited to mergers and acquisitions. Rather, "concentrations" covered by the Regulation may include any exchange of securities or assets, contract or other action by which "the possibility of exercising decisive influence on an undertaking" is transferred.[14] The potential for joint ventures to constitute concentrations under this definition has been a controversial issue. Article 3 of the Regulation generally provides that joint ventures which are involved in the coordination of competitive behaviour of independent companies should be dealt with under Article 85 of the EEC Treaty rather than the Merger Control Regulation. Joint ventures, however may, be examined under the Regulation if they lead to the creation of an "autonomous economic entity."[15]

The Merger Control Regulation generally applies to concentrations having a "Community dimension" as defined by the following thresholds:

(i) the aggregate world-wide turnover of the relevant parties must be more than 5 billion ECU (about $8 billion Cdn.);

(ii) the aggregate Community-wide turnover of each of at least two of the merging undertakings is more than 250 million ECU (about $400 million Cdn.); and

(iii) each of the relevant parties must achieve no more than two thirds of its Community-wide turnover within one Member State.[16]

Each of these criteria must be met in order for a concentration to have a Community dimension.

Due to the high size thresholds that must be surpassed in order for concentrations to have a Community dimension, it is expected that the Regulation will automatically apply to only about 60 transactions per year. Article 1(3) of the Regulation requires, however, that a review of the thresholds take place by December 21, 1993. This review may lead to a substantial reduction of their levels. For instance, the EC Commission is advocating that the thresholds be lowered to 2 billion ECU ($3.2 billion Cdn.) world-wide turnover and 100 million ECU ($160 million Cdn.) Community-wide turnover.[17]

2.2 The Allocation of Jurisdiction Under the Regulation

The Regulation provides that the EC Commission, subject to review by the Court of Justice, is normally to have responsibility for the review of concentrations that have a Community dimension or are referred to the Commission by a Member State.[18] There are, however, some significant exceptions. National authorities are permitted under the Regulation to intervene to protect legitimate interests, such as public security, that are considered to be compatible with the general principles of the Community.[19] In addition, in cases where a distinct market exists within a Member State that would be affected by a concentration, the Commission can return

jurisdiction to the competent authorities in the relevant country. It should be noted, however, that the Commission, in these cases, has the option of retaining jurisdiction, while taking account of the objective "to maintain or restore effective competition in the market concerned".[20]

Concentrations that do not surpass the Community dimension thresholds, unless they are referred to the Commission, are subject to control by the relevant Member States. The implementation of the Regulation, however, has not ruled out the possibility of smaller concentrations also being reviewed under Articles 85 and 86 of the EEC Treaty. Although the Regulation has increased the procedural difficulties relating to the application of Articles 85 and 86 to smaller mergers by the EC Commission, the Commissioner responsible for competition policy (Sir Leon Brittan) has indicated that the Commission may still examine concentrations falling between the current Community dimension thresholds and those that he is advocating for application after December 1993.[21] In addition, the National Courts of the Member States may still apply the EEC Treaty competition provisions to some concentrations falling between the current and proposed Community dimension thresholds.[22]

2.3 The Criteria for Assessing Concentrations

The competitive implications of concentrations should be the main criteria used for their assessment under the Merger Control Regulation. Article 2(3) provides that only those concentrations that create or strengthen a dominant position, "as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it," will be found incompatible with the common market.[23] Furthermore, the Commission, in its analysis, is required to take account of "the need to preserve and develop effective competition within the common market".[24]

Article 2 of the Regulation also lists a number of other factors that the Commission must take into account. These include, for example, the remaining actual or potential competition in markets that are affected, the market position and financial standing of the relevant companies, barriers to entry, and trends in supply

and demand. These, and the other factors mentioned in Article 2 are generally consistent with the ones listed in the merger provisions of the Canadian Competition Act. A noteworthy exception, however, is the Regulation's treatment of economic efficiencies. The Regulation, unlike Canada's merger provisions, does not provide a defence based specifically on economic efficiency gains. Rather, it merely requires that the Commission take into account "the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition."[25]

The use of competition-based criteria for the assessment of concentrations under the Regulation has not, however, completely allayed concerns that other factors may be taken into account. Rather, it has been suggested that other considerations may enter the analysis of concentrations through a number of channels. One such channel is the Member States' authority under Article 21 to take appropriate measures to protect interests that are considered to be consistent with the general principles and other provisions of Community Law. It has also been suggested that the requirement for the Commission to take account of economic and technological progress may allow industrial policy considerations to enter into the merger review process. In addition, the preamble to the Regulation requires that the Commission keep in mind the economic and social cohesion, and other fundamental objectives of the EEC Treaty when applying the Regulation.[26]

2.4 The Procedure of Investigations

The Merger Control Regulation embodies strict time limits, set forth in the following table, for the notification of mergers having a Community dimension, the initiation of proceedings, and the Commission's assessment of the compatibility of concentrations with the common market.

The Timing of Procedures
Under the Merger Control Regulation

Stage of the Investigation	Time Allotted	Cumulative Time Permitted
Notification of concentrations having a Community dimension to the EC Commission	1 week from the completion of a binding agreement or announcement of a public bid	1 week
Mandatory suspension of completion of the concentration	3 weeks from notification*	4 weeks
Decision regarding further proceedings under the Regulation	1 month from notification	1 month plus 1 week
Commission decision on the compatibility of the concentration with the common market	4 months from the decision to take further proceedings	5 months plus 1 week

Source: See Articles 4(1), 7(1)-(3), and 10 of the Merger Control Regulation.

*This period may be extended by the Commission to ensure the effectiveness of any later decision that may be taken on the compatibility of concentrations with the common market. Also, separate allowance is made for limited implementation of public bids before 3 weeks.

As indicated by the table, parties to concentrations coming under the Regulation have only one week following the completion of a binding agreement or the announcement of a public bid to complete notification. The guidelines for notification, however, indicate that it may require the collection and processing of a large amount of information dealing with: the size of the relevant companies; the market shares of the merging parties; the nature and competitive conditions of EC markets in which the combining companies collectively have more than a 10 percent share; impediments to entering the relevant markets; and other matters.[27] This information must be provided unless it cannot, in good faith, be supplied by the combining companies, or these companies can demonstrate to the Commission that it is not necessary for examination of the concentration.[28] Otherwise, failure to supply the information required in the prescribed manner, or the supply of incorrect or misleading information, can extend the period during which completion of a concentration may be suspended and even lead to the imposition of fines.[29] Notification must be carried out jointly by the relevant parties or by a company that is acquiring another.[30]

The Merger Control Regulation provides for hearings to allow concerned parties to present their views on a proposed concentration prior to a final decision on the concentration's compatibility with the common market. Persons showing a legitimate interest in a proposed concentration, such as members of management or labour representatives, are specifically entitled to be heard. In addition, the Commission may permit third parties to make representations.[31]

2.5 Powers of Decision of the EC Commission

Formal investigations under the Regulation are terminated by a decision on the compatibility of the concentration under review with the common market. The decisions of the Commission may also include conditions or obligations that have been accepted by the participants in a concentration in order to ensure its approval. Failure to comply with such conditions, or the completion of a merger that has been found to be incompatible with the common market, renders the parties to the merger subject to possible fines of up to 10 percent of their aggregate turnover.[32] If a concentration is completed that is later found to be incompatible with the common

market, the Commission can order that the concentration be dissolved, or that other actions be undertaken to maintain effective competition. Failure to comply with such an order can also result in the imposition of substantial fines.[33]

3. The Implications of the Merger Control Regulation for Canada

3.1 The Coverage of Canadian Business Activity Under the Regulation

In the short term, the Merger Control Regulation is unlikely to apply to a large number of mergers, acquisitions and other concentrations involving Canadian firms. Few Canadian businesses are likely to participate in concentrations involving companies collectively having world-wide turnover in excess of $8 billion Cdn., and at least two companies having Community-wide turnover of more that $400 million Cdn. The expected lowering of these thresholds by December 1993, however, could expand the number of concentrations involving Canadian businesses that may come under the Regulation. In addition, until the Community dimension thresholds are reviewed, the possibility exists that some smaller concentrations involving Canadian businesses will be dealt with under the Merger Control Regulation at the request of individual Member States. Because a number of the Member States do not yet have well developed competition laws on mergers, it is possible that a substantial number of smaller concentrations will be referred to the Commission.[34]

Canadian businesses that may be involved in concentrations having a Community dimension, should be aware that the application of the Merger Control Regulation is not limited to concentrations taking place in the EC. Rather, the Regulation may also allow the EC Commission to take action with respect to concentrations between Canadian-based companies, or Canadian and non-EC companies that meet the Community dimension thresholds. Moreover, mergers and acquisitions taking place in Canada and other non-EC countries that may have a Community dimension are not the only arrangements taking place outside of the Community that might come under the Merger Control Regulation. Rather, the broad definition of concentrations under the Regulation suggests that, in certain cases, it may also apply to joint ventures, export consortia or other arrangements

taking place outside of the EC that may nevertheless affect exports to the Community.[35]

3.2 Implications of the Timing of Investigations

Canadian companies that become involved in mergers having a Community dimension will be subject to a short deadline for notification of one week following the completion of a binding agreement. As noted, however, the completion of notification may require the collection and processing of a large amount of information on the parties to the agreement and the markets in which they operate. Also, failure to meet the notification deadline can delay approval for mergers and result in fines.

The pressure created by the short time frame for notification might be eased through the collection and preparation of the required material while negotiations on a concentration are underway. In addition, companies may be able to reduce the amount of information required for notification through the use of informal channels that the EC Commission is making available for prenotification of proposed concentrations. Early meetings with EC competition authorities may help to reduce the amount of information that will have to be provided later, given the Commission's discretion to relieve companies of the obligation to notify information that it does not consider to be relevant for its examination.[36]

Informal contacts with EC competition authorities before and after notification may also be helpful for the later stages of investigations under the Merger Control Regulation. A number of commentators have questioned whether EC competition authorities will be able to effectively perform their preliminary and final analysis of concentrations covered by the Regulation in the short time frame that is allowed (one month for a preliminary assessment and four additional months for a final decision).[37] Given the high size thresholds embodied in the Regulation, these concentrations will normally be large and highly difficult to analyze. Moreover, Canadian experience on the implementation, in 1986, of the merger provisions in the Competition Act indicates that the need to get the new procedures up and running effectively will inevitably strain resources. In the EC,

such problems may be even further complicated by the need to deal with personnel from a number of different countries, as well as different backgrounds in the area of competition policy and merger control.

The EC Commission, however, will have only a limited amount of resources available for implementing the Merger Control Regulation - the EC Director General for Competition Policy has indicated that a 46 member task force will be overseeing this area of competition policy for the entire Community.[38] Given these constraints, effective use of informal channels for discussion with EC competition authorities before and after notification may be highly beneficial for helping the Commission to come to more rapid and well-reasoned decisions.

3.3 Implications of the Regulation for the Overlap of Merger Control in the EC

The Merger Control Regulation should go some way toward reducing the undue costs and uncertainty that have been involved in merger proceedings in the EC due to the overlap of jurisdiction in the merger area between the EC Commission and the Member States. Large concentrations having a Community dimension, except in certain cases, should be under the sole jurisdiction of the EC Commission. For these concentrations, the procedures set forth in the Regulation should provide for more rapid and certain review by EC competition authorities.[39]

The possible exceptions to the EC Commission's sole jurisdiction over mergers having a Community dimension may, however, restrict the potential benefits of the Regulation. For example, the Regulation does not prevent the Member States from intervening in regard to large concentrations for public safety and other reasons that are considered to be consistent with the principles of the Community. The existence of these exceptions, plus possible uncertainty concerning whether or not a concentration actually meets the Community dimension criteria, may make it prudent for participants in concentrations to continue to approach both EC and national competition authorities.[40]

The Regulation, as noted, does not specifically rule out the potential for overlapping application of Community and national competition legislation to

smaller concentrations that do not meet the Community dimension criteria. The probability of this occurring, however, should be somewhat reduced. EC competition authorities should be less likely to deal with smaller concentrations given the strains that will be placed on the limited resources that they will have available to also deal with concentrations coming under the Merger Control Regulation. Another factor that may weigh against frequent attempts by the EC Commission to apply the Community competition rules to smaller mergers is the long-standing resistance in many Member States against the Commission having sole jurisdiction even over large concentrations. The Commission may be reluctant to risk aggravating its relationship with these countries by conducting parallel investigations on smaller mergers when it is intending to seek expanded jurisdiction over mergers in the not too distant future.

3.4 Implications Relating to the Analysis of Mergers Under the Regulation

The analysis of concentrations under the Merger Control Regulation may have important implications for the ability of Canadian businesses to compete effectively in EC, Canadian and other markets. Excessively strict or discriminatory treatment of concentrations involving Canadian companies could impair their ability to gain access to European markets through mergers, acquisitions or other concentrations. Another potential concern that has often been raised is that the Regulation might promote the formation of large "European champion" companies for the intended purpose of helping EC industries to become dominant in Community and other markets.[41]

The final draft of the Merger Control Regulation, however, does not provide specifically for either discriminatory treatment of non-EC firms or the formation of dominant firms for the purpose of competing in world markets. Rather, as under the merger provisions of the Canadian Competition Act, the main criteria for assessing concentrations under the Regulation should be their potential implications for competition in domestic markets. The central focus that the final draft of the Regulation places on competition is a major change from some earlier drafts of the Regulation. These would have required the Commission to take greater account of broader industrial and social policy concerns.[42]

Statements that have been made by the Commissioner responsible for competition policy (Sir Leon Brittan) also suggest that non-competition factors are not intended to have a major impact on the analysis of concentrations under the Merger Control Regulation. In this regard, Commissioner Brittan has stated:

> .... companies that are allowed to operate in a monopolistic way in their own home markets, whether those are national or European, are in fact unlikely to become world beaters. Without the spur of competition in their own market they will inevitably be tempted to rely on and reinforce their dominance of that market and will not have the cutting edge needed to secure success on the world stage. Size will never be sufficient to ensure this success. And size brought about by the destruction of effective competition is likely to be a trap, rather than a spur.[43]

Commissioner Brittan, therefore, has rejected the argument that EC companies should be permitted to combine on a large scale merely to help them obtain a dominant position vis-à-vis firms from other countries.

The current position of Commissioner Brittan regarding merger control and industrial policy, however, does not guarantee that political and industrial policy considerations will remain outside of the EC merger review process over the longer term. As noted, such considerations might influence the analysis of concentrations through a number of features of the Regulation, such as the requirement to examine the implications of concentrations in relation to the market integration objectives of the EEC Treaty. In addition, strong pressure to take social, industrial and other policy considerations into account when applying the Merger Control Regulation may eventually be created by the composition of the EC Commission, which includes Commissioners having responsibility for all areas of EC policy. It has been argued that the diverse backgrounds of the Commissioners could create pressure on competition authorities to take other policy areas into account when applying the Regulation, as well as help to obscure the actual bases for decisions.[44]

3.5 EC Relations With Other Countries Under the Regulation

The provisions of the Merger Control Regulation relating to EC relations with other countries are a further potential area of concern for Canadian interests. Article 24 of the Regulation requires that the EC Commission report, by September 1991, and periodically thereafter, regarding the treatment of Community enterprises under the merger laws of other countries. Should the Commission conclude that the laws of another country do not reciprocate the treatment of non-EC countries under the Merger Control Regulation or discriminate against EC companies, it can request a mandate from the Council of European Communities to negotiate with the relevant non-member countries to obtain comparable treatment for Community companies.

Commissioner Brittan has stated that Article 24 is not intended as a "reciprocity clause" in that it might lead to less favourable treatment of concentrations involving companies from countries whose merger policy is considered to discriminate against EC businesses.[45] Nevertheless, the provision could place pressure on Canada and other countries to alter aspects of their merger policy that the Commission may view as favouring these countries' enterprises over EC-based companies. It is not expected that this will lead to significant pressure on Canada to alter the merger provisions added to the Competition Act in 1986. While complaints might arise from time to time regarding the handling of specific mergers, the relevant provisions of the Competition Act do not provide specifically for discriminatory treatment of foreign companies. Pressure may be exerted on Canada, however, to alter aspects of any merger review process followed by provincial or federal governments that are believed to discriminate against EC companies.

IV. EC COMPETITION POLICY ON STATE AIDS AND EUROPE 1992

As noted, stricter control of state aids is accepted within the EC as necessary for the completion of the internal market by 1992. Yet, at the outset of the current initiative to complete the internal market, little was known of the extent and nature of such aids. The completion in 1988 of the First Survey on State Aids, and the updating of the Survey in July 1990, have helped to provide a much clearer picture of the aid situation in the EC.[46] The findings of these surveys have also provided guidance for a number of changes in the treatment of state aids by EC competition authorities. This section examines these and other recent developments relating to the EC competition policy treatment of state aids and their potential implications for Canadian businesses and public policy.

1. The Nature and Extent of State Aids in the E C

The first and second Survey on State Aids have shown EC Member State subsidization of industries to be running at a high level. The amount of Member State aid granted between 1986 and 1988 averaged over 82 billion ECU (about $130 billion Cdn.) per year. State aid granted to the manufacturing sector during this period amounted to 4 percent of the sector's total value added, or about 1500 ECU ($2400 Cdn.) for every worker in the sector. In addition, large amounts of state aid were granted in the agriculture, fisheries, transportation and energy sectors.

The first and second state aids surveys also revealed some significant trends in the level of state aid in the Community. The first survey indicated that a substantial increase of state aid to the manufacturing sector, excluding shipbuilding and steel which are subject to Community-wide regulations, took place between 1981 and 1986. This was to some extent expected because of the economic difficulties encountered by the Community during the early 1980's. The second survey, however, found the high level of subsidization established in the early 1980's to be persistent. As a consequence, the level of state aid granted during 1988 remained well above the level provided during 1981.[47]

The information provided in the surveys on state aids also indicates that the significance of industrial subsidization varies greatly among the individual Member States. Between 1986 and 1988, Italy, among the four largest Member States, had the highest rate of subsidization, 6.7 percent of total manufacturing value-added. In contrast, the rates of manufacturing aid in Germany, France and the U.K. were 2.7 percent, 3.7 percent and 2.7 percent, respectively.[48]

The surveys on state aids also highlighted the importance of the different objectives that have been used by the EC Member States to justify intervention. Objectives that have been used to justify substantial amounts of state aid include the promotion of exports to non-EC countries, increased R&D or innovation, and the provision of assistance to small or medium-sized enterprises. In addition, the surveys indicated that a large amount of state aid to manufacturing has been provided to crisis sectors or regions. Much of this aid has been granted to the steel and shipbuilding industries which have formal aid frameworks. The remainder has been spread among other manufacturing industries and Member State regional aid programs.

The findings of the first and second Survey on State Aids raise important concerns for Canada. The high level of the aid being granted suggests that it may be having a negative effect on the ability of many Canadian companies to compete effectively not only in EC markets, but also in Canadian and other countries' markets. Also, the surveys underscore the continuing willingness of EC Member States to intervene to protect their domestic industries for a wide range of economic and social policy objectives. Strong attempts by EC competition authorities to roll back state aids are, therefore, likely to encounter stiff opposition from the Member States.[49]

2. Measures for Strengthening EC Competition Policy on State Aids

2.1 The Redirection of Enforcement Policy on State Aids

The First Survey on State Aids had a major impact on the EC Commission's approach to the application of Articles 92 and 93 of the EEC Treaty. The report pointed to major inadequacies in the approach that EC competition authorities had been following in this area, which was based on the review of new subsidy programmes notified to Community competition authorities by the Member States. The First Survey demonstrated, however, that the bulk of the aid that is granted in any given year falls under programmes that have received approval in previous years. Perhaps not surprisingly, the Survey indicated that such programmes have tended to accumulate in the Community rather than diminish over time.[50]

In respect of this situation, Commissioner Brittan indicated, in March 1989, that greater emphasis would be placed on the review of major existing aid schemes.[51] Commissioner Brittan also singled out a number of types of aids that he considers to be in particular need of greater scrutiny because of their growing importance and potential for anti-competitive effects. These aids include:

(i) assistance provided for the promotion of exports to non-EC countries;

(ii) general investment aids that allow governments to intervene in all branches of an economy;

(iii) capital injections to nationalized industries and state holding companies; and

(iv) industrial policy related aid granted to key sectors or national champions.

The decision to concentrate on certain types of aids signalled a shift in EC policy toward a more proactive approach. Rather than merely reacting to proposals for the granting of new aid by the Member States, EC competition authorities are now focussing their attention on aids that, in their view, create the greatest threat to trade and competition in the Community.[52]

Some recent pronouncements by Commissioner Brittan indicate that the increased emphasis being placed on the application of Articles 92 and 93 of the EEC Treaty to major existing aid schemes is starting to have a significant impact. The Commissioner has called for four EC Member States, the U.K., Italy, Belgium and the Netherlands, to abandon major investment aid schemes.[53] The basis for these objections was the generality of the schemes. The Commission was concerned that this had led, or could lead, to *ad hoc* interventions in the marketplace to the detriment of both competition and better targeted sectoral or regional aid programmes. Objections to other such aid programmes are anticipated as the Commission continues with its avowed policy to examine the compatibility of all major existing aid schemes with EC competition policy.

2.2 The Framework on Aid to the Motor Vehicle Industry

In connection with the Europe 1992 initiative, the EC Commission is also taking measures that are specifically designed to impose stricter controls on state aids in areas where they have traditionally run at a high level. One such area is the European motor vehicle industry. Widespread state aid to manufacturers has long been an important feature of this industry. Between 1981 and 1986, this aid added to more than 11 billion ECU (about $17 billion Cdn.). More than half of this amount was channelled to loss-making state-owned manufacturers. However, substantial amounts were provided to most major European car manufacturers.[54]

Establishing effective controls on this aid is considered by EC competition authorities to be essential for the integration of the internal market for automobiles by 1992. To this end, the EC Commission, in July 1988, introduced the Framework on State Aid to the EC Motor Vehicle Industry.[55] This framework is intended to promote stricter compliance of aid granted to car manufacturers with Community competition policy by increasing its transparency, and ensuring proper notification of aids to the EC Commission. The Framework requires that Member States, after January 1, 1989, notify the EC Commission of proposals to provide aid in any form to motor vehicle manufacturers that is in excess of 12 million ECU ($19 million Cdn.). This obligation applies with respect to aid granted under both new and existing programmes.

The Framework on State Aid to the Motor Vehicle Industry also sets forth criteria to be used by the EC Commission for assessing the compatibility of this aid with the EEC Treaty. These criteria reflect a negative view of aids granted for such reasons as the rescuing or restructuring of companies, or the modernization or rationalization of facilities. The framework suggests that such aid is likely to be permitted only in a narrow range of circumstances . Furthermore, in cases where this aid is permitted, it is likely to be subject to conditions pertaining to the restructuring or removal of existing capacity. A similarly negative view is adopted in the Framework with respect to the granting of environmental and energy related aid, as well as operating aid.

It should be noted, however, that a relatively permissive approach is adopted under the Framework with respect to regional aid, as well as research and development aid to the motor vehicle industry. The Framework accepts that motor vehicle aid can be an effective instrument for relieving regional disparities within the EC. It also indicates that the Commission, in keeping with its 1986 Framework on State Aid for R&D, will maintain a positive attitude towards aid for pre-competitive R&D (i.e. basic research).[56]

A strong commitment on the part of EC competition authorities to the establishment of stricter controls over certain state aid to the motor vehicle industry is also reflected in a number of recent findings under Articles 92 and 93 of the EEC Treaty. In one instance, the Commission succeeded, in spite of strong resistance from the government of France, in forcing Renault to pay back 6 bil. French Francs in aid provided to the car group.[57] The basis for the repayment was the finding by the Commission that Renault had not lived up to a capacity reduction commitment that it had made in order to gain approval for the aid.

In another recent case, the Commission concluded that £44.4 mil. of aid, that was provided to British Aerospace in July 1988 in connection with its purchase of the Rover Group, was granted illegally by the U.K government.[58] This aid consisted of concessions provided to British Aerospace that were in addition to ones permitted by the Commission in its original 1988 decision on the acquisition. The

Commission has ordered the U.K. government to recover the additional aid. Moreover, based on a review of the acquisition, the Commission has indicated that a further amount, in the neighbourhood of £40 million, may have to be recovered due to underspending for projected restructuring, and the overevaluation of debt items used by the Commission for its initial decision in the case.

Recent decisions of the EC Commission, however, also indicate that the crackdown on EC state aid to motor vehicle manufacturers has not eliminated the threat of large scale subsidization in the sector. The decisions in the Renault and British Aerospace/Rover cases, for example, led only to the scaling down of state aid. Also, other recent decisions by the Commission have permitted the granting of substantial assistance to motor vehicle manufacturers in a number of EC countries.[59]

2.3 Measures to Control Aid to State-Owned Companies

The granting of direct and indirect subsidies to companies is another area where the EC Commission is seeking stricter adherence to the Community's competition rules on state aid. The EC Commission is not directly challenging state ownership of companies, which is an integral part of the economies of many Member States. However, it is examining measures for ensuring that state ownership does not provide the means to circumvent the Community rules on state aid.[60]

The task facing EC competition authorities in this area will be a difficult one. The granting of state aid to public companies is not given any more lenient treatment under Articles 92 and 93 of the EEC Treaty than is other aid. In practice, however, aid to state-owned enterprises may be particularly hard to detect and prevent. The direct financial linkage between the government and the beneficiary makes possible the use of many hard to detect forms of aid, such as government backing for loss-making investments. It is feared that the removal, by 1992, of more visible means for governments to intervene in EC markets will lead to greater use of these types of aid.

To help reduce the threat to the internal market engendered by the granting of aid to state-owned enterprises, the EC Commission has expressed the intention to develop guidelines on the granting of this aid. It is intended that these guidelines will deal, in particular, with assistance provided to public companies through:

i) implicit loan or other guarantees;
ii) acceptance of low rates of return; and
iii) foregone dividends.[61]

The detection of such subsidies will require close scrutiny of the financial situation of public companies' investment plans and future prospects. Accordingly, the Commission recently put forward a proposal for strengthening the annual reporting obligations on financial relations between the Member States and state-owned companies. The proposed reporting rules would apply to manufacturing companies with annual turnover of more than 200 million ECU.[62]

The success of EC competition authorities in controlling state aid to public companies will be an important test for the Community's competition policy. While it may not be an express intention of the EC Commission to limit the right of the Member States to hold capital in companies, it is apparent that strict Community controls on the relations between governments and state-owned enterprises could severely restrict the ability of governments to use these enterprises as instruments of industrial and social policy. Rather, effective controls on state aids to these enterprises would essentially require that state-owned companies operate as though they were private companies. This prospect could meet with stiff resistance from countries, such as France, Spain and Italy, that have a high degree of state ownership in their economies.[63]

2.4 Other State Aids Initiatives

EC competition authorities are also taking initiatives on a number of other fronts for the purpose of reducing the use of anti-competitive state aids. Another area in which stricter adherence to Articles 92 and 93 of the EEC Treaty is being sought is the requirement, under these provisions, to notify the EC Commission of

new subsidy programmes and changes to existing programmes. During the 1985-1987 period, the EC Commission identified 149 cases in which appropriate notification of state aids was not carried out. Moreover, the significance of these aids in relation to all state aids granted followed an upward trend, rising from 11.5% to 18% from 1985 to 1987.[64]

As a consequence, the EC Commission, in December 1988, initiated procedures under Article 169 of the EEC Treaty against five EC Member States, France, Belgium, Greece, Spain and Italy, for having systematically failed to notify the Commission of aid programmes.[65] Article 169 enables the Commission to take action against Member States that do not fulfil an obligation under the EEC Treaty, such as the notification requirements under Article 93. While the Commission found that all Member States had failed to meet these requirements in some cases, the above-mentioned countries were singled out in the Article 169 action as having been the worst offenders. To help correct the situation, the Commission requested that the governments of these countries reply within two months concerning plans they were undertaking to ensure that the state aid notification requirements would be respected in the future.

The EC Commission has also attempted to promote strict adherence to the state aid notification requirements by forcing the repayment of inappropriately notified state aids without any consideration of their acceptability under Article 92. These efforts, however, suffered a significant setback with the decision of the Court of Justice in February, 1990 in the Boussac case.[66] In this case, the EC Commission asserted that the inappropriate notification of aid could, by itself, provide sufficient grounds for its recovery. The Court of Justice concluded, however, that the Commission, in such cases, can only order the suspension of further payments of aid until its compatibility with the EEC Treaty can be determined. The Court's decision, therefore, provides less incentive for early notification of aids than was desired by the Commission.

Other measures that EC competition authorities have taken to establish stricter compatibility of state aid with the EEC Treaty have included the release, in 1987, of guidelines for the designation of disadvantaged regions in which the

Member States might be allowed to provide high intensity capital grants, and certain other aids to help overcome developmental disparities.[67] In 1985, the Commission established the Community Guidelines on State Aids for Research and Development which were designed to create greater transparency and certainty regarding EC policy on these aids.[68] In addition, measures adopted by the EC Commission during 1989, including the extension of the framework for aid to the man-made fibres industry, and the reduction in the amount of authorized aid under the framework for aid for shipbuilding, have been offered as further evidence of the EC Commission's determination to limit anti-competitive state aids.[69]

3. The Implications for Canada of the EC Efforts to Strengthen the Controls on State Aids

The establishment of strict control over the granting of industrial aids by EC Member States is recognized by the EC Commission as being highly important for the completion of the common market by 1992. Without such controls, other measures to remove barriers to intra-EC trade might often be thwarted by the use of industrial aids by Member States to prop up inefficient businesses, protect targeted industries from competitive forces, or achieve other social or industrial policy goals. The developments outlined above reflect a strong commitment by EC competition authorities to deal with this threat by forcing countries to ensure that existing as well as new aid schemes are consistent with the EEC Treaty.

The potential effects of these developments on the overall level of subsidization in the EC, however, should not be overestimated. There continues to be strong resistance among some Member States against further controls on their granting of industrial aid, for example, to public companies. In addition, even if stricter controls on state aids are established, the Member States will still be able to operate state aid schemes relating to regional disparity, research and development, social policy and other objectives that are permitted under the EEC Treaty.

The possibility also exists that stricter controls on the granting of state aid will be accompanied by greater industrial subsidization under Community-run programmes. This may occur as responsibility for European technology, industrial

and regional policy is increasingly shifted to the EC Commission. While Community industrial aid remains low overall relative to Member State aid, a trend, in some areas, toward greater reliance on the former is suggested by the findings of the Second Survey on State Aids. They indicate that there was a steady upward trend in industrial aid granted by the Community between 1983 and 1988, while Member State aid decreased.[70]

These developments suggest both potential benefits and dangers for Canadian businesses. On the positive side, the measures aimed at establishing stricter control on state aids should contribute toward the opening of opportunities for Canadian companies in the EC marketplace, such as those outlined in other reports in this series. Canadian companies should, in general, be less likely to have their competitive position in Community markets undermined by interventionist state aid programmes. Accordingly, they should have greater scope for competing in Europe based on cost effectiveness and efficiency.

The changes occurring in the handling of industrial aid in the EC, however, raise a number of possible concerns for Canadian businesses and public authorities. If aid provided to inefficient EC sectors is substantially reduced, Canadian businesses, over the long term, will be likely to encounter more effective competition overall from EC companies both in European and world markets. This could result not only from increased efficiency of EC production, but also from the lowering of the tax burden imposed on more efficient EC companies.

This, in turn, may call for changes in the methods for granting government aid to industries and regions in Canada. It will become even more important to ensure that grants of federal or provincial aids are allocated in a manner that minimizes the potential harm to the competitiveness and efficiency of Canadian businesses in all industries. In particular, it will be even more important to ensure that federal or provincial aid does not lead to conflicting subsidization in different regions or sectors of the economy that reduces the overall competitiveness of Canadian industry. It will also be increasingly important to minimize the use of subsidy practices that may impede the emergence of efficient Canadian companies by

subjecting them to unfair competition within the country, or by unnecessarily sheltering inefficient companies.

Aspects of the approach to subsidies under Articles 92 and 93 of the EEC Treaty might provide a useful guide on ways to help ensure that Canadian federal and provincial subsidies do not unnecessarily harm Canadian industrial efficiency and international competitiveness. In a Canadian context, such an approach would ensure that the direct and indirect effects of subsidies provided by different levels of government on competition among Canadian companies would be an important consideration in relation to the granting of subsidies. The application of this principle in Canada through, for example, the joint development of provincial and federal policy on subsidies, the adoption of related competition rules or other means, could help to reduce the potential for subsidies in one part of the country to unnecessarily impair the competitiveness of companies in other regions, and the Canadian economy as a whole.

Finally, it should not be expected that the current efforts of EC competition authorities to impose stricter discipline on state aids will fully remove the direct threat these aids may pose for Canadian business and economic interests. While these efforts should result in a lower overall level of state aid than would otherwise be the case, the EC Member States will continue to have broad scope for providing aid related to social policy objectives, research and development, regional parity, and other goals considered to be consistent with the EEC Treaty. The possibility that Community-wide aid programmes may increase in size and scope as Member State aid becomes more strictly controlled is a further area of potential concern. An expanded role for EC central authorities, for example, in the support of research and development and high technology industries, may create an even greater threat to the competitive position of some Canadian companies. Rather than having to overcome the policies of individual Member States, Canadian companies, in some cases, might have to overcome competitive disadvantages created by a large well-funded central EC authority.

The developments outlined in this section, therefore, do not reduce the importance to Canada of the GATT negotiations, or other multilateral or bilateral negotiations, on the restriction of industrial aid. Rather, these negotiations continue to be highly important for the establishment of a liberal international trade framework under which Canadian companies will be able to compete on an equal footing.

V. THE PROMOTION OF COMPETITION POLICY IN HIGHLY RESTRICTED AREAS OF THE EUROPEAN ECONOMY

The scope for competition in many areas of the European economy has traditionally been severely restricted by regulatory and administrative restraints imposed by the Member States. In the air travel sector, for example, competition within the EC has been limited by the use of bilateral agreements between the Member States on fare levels, the number of carriers allowed to operate on routes, and the sharing capacity among authorized carriers. In a number of other sectors, competition has been greatly restricted by public procurement practices favouring suppliers from the purchasing Member State over suppliers from other EC countries.

The EC Commission has recognized from the outset of the Europe 1992 initiative that the dismantling of such restraints would be necessary for the completion of the internal market. It has also been recognized, however, that ensuring the development of open and competitive markets in previously highly restricted areas of the European economy would require active enforcement of Community competition policy. In particular, effective application of the EC competition rules in these areas is considered necessary to ensure that companies will not be able to thwart efforts to open their markets through the use of anti-competitive private arrangements.

This part of the report surveys recent EC efforts to establish competitive markets in a number of traditionally highly restricted areas of the European economy. The discussion focuses on developments in three sectors that have been singled out by EC competition authorities as areas of concern the: air travel; telecommunications; and banking and insurance sectors. In addition, it examines measures that have been taken to enhance competition in the area of Member State public procurement. Subsection 1 outlines major market-opening reforms that have been proposed or adopted in the above areas. Subsection 2 examines efforts being made to extend EC competition policy in these areas. Subsection 3 discusses

the implications of these developments for the competitive environment faced by Canadian businesses as well as for Canadian public policy.

1. Pro-Competitive Legislative Reforms in Highly Restricted Areas of the EC Economy

1.1 Air Travel

Two packages of regulatory reforms have been adopted since the start of the Europe 1992 initiative for the purpose of enhancing competition in the EC air travel sector. The following table outlines a number of the main market opening measures included in these packages.[71]

Pro-Competitive Regulatory Reforms
in the EC Air Travel Sector

Measures Adopted	Implications	Date of Implementation
Cost-based fare approval	Member States are required to base their approval of air fares on the costs of the relevant airline.	November 1, 1990
Automatic Fare Zone System	Carriers authorized to serve routes between Member States will be able to adjust fares within predetermined discount zones. The extent of discount that may be offered varies according to the nature of the service being provided.*	To be fully implemented by November 1, 1990; will remain in effect until December 31, 1992.
Relaxation of Capacity Sharing Restrictions	Carriers authorized by a Member State to serve a route will not, with certain exceptions, be prevented from increasing their capacity share by 7.5% or less per season. Capacity sharing restrictions are to be abolished.	November 1, 1990 Scheduled for implementation before January 1, 1993
Multiple Designation of Carriers on Routes	Member States will be able to unilaterally designate more than one carrier on Major European city-pair routes (i.e. routes having more than 100,000 passengers or 600 return flights per year).	To be fully phased in by January 1, 1992
Limited Fifth Freedom Rights	Community-based airlines will be able to devote up to 50 percent of their capacity to routes on which they can pick-up and drop-off passengers at three destinations in different Member States.	To be fully implemented by November 1, 1990

Sources: See Council Regulations (EEC) No 2342/90 and No 2343/90 of July 24, 1990 superseding Council Directives (EEC) No 87/601 and 87/602 of December 14, 1987.

*There are three fare zones allowing for discounts of up to 70%. These discounts are permitted, however, only if certain conditions are met relating to return travel, advance booking, length of stay, age of passengers and other characteristics of the travel being provided.

The measures outlined in the table are intended to go a substantial way toward reducing the anti-competitive effects of the former bilateral agreement framework in the EC air travel sector. The use of cost-based criteria for fare approval combined with the establishment of the automatic fare zone system is expected to provide airlines in the EC with greater flexibility to base air fares on their actual costs of operation as well as consumer demand for different classes of air travel. Furthermore, the easing of capacity and entry restrictions should provide more efficient EC airlines with greater opportunity to benefit from competitive pricing by allowing them to expand their capacity shares on routes. The opening of fifth freedom rights should help EC airlines to increase their efficiency by allowing them to more effectively combine service to more than two countries within the Community.

The first and second packages of air travel reforms, however, have left in place a number of major obstacles to the competitive and efficient operation of airlines in the EC. Airlines are still required to obtain approval from both Member States on a route if they wish to establish scheduled fares at levels falling outside of the fare zone system. Also, the measures that have been adopted have not included so-called cabotage rights (i.e. the rights that allow an airline based in one Member State to carry passengers between two points inside a second Member State). Provisions relating to these issues were initially proposed as part of the second package of air travel regulatory reforms. They were removed, however, due to strong objections from some EC countries which were concerned that they could jeopardize the interests of their national airlines.[72] A further issue that has not been resolved is the method for slot allocation at Community airports. This is potentially a major barrier to competition since it can prevent airlines from gaining access to the facilities required to enter new routes. In respect of these and other remaining obstacles to competition in the EC air travel sector, the EC Commission is intending to introduce a third package of measures to further liberalize EC air travel after 1993.[73]

1.2 Telecommunications

EC Commission policy regarding the opening of the European telecommunications sector was set forth in the 1987 Green Paper on the Development of the Common Market for Telecommunications Services and Equipment.[74] The program for reform outlined in the Green Paper included a broad range of proposals for promoting Community-wide competition in many areas of telecommunications equipment and services. The Green Paper, however, stopped short of calling for the opening of EC markets for basic voice telephone services. It also accepted, as a future policy orientation, that Member State telecommunications administrations should be able to maintain their monopolies over national network infrastructure.

A number of the reforms called for in the Green Paper have been adopted. The integration of the EC telecommunications equipment market was accomplished in May 1989, with the adoption of the EC Commission Directive on Competition in the Telecommunications Terminals Market.[75] Products covered by this Directive include, for example, telephones, fax machines, data transmission and switching equipment, and modems. The Directive includes provisions to: remove restrictions on the connection of telecommunications equipment manufactured in one Member State to the network infrastructure of other Member States; ensure that suppliers of terminal equipment covered by the Directive will be able to market and service their products in all Member States; and prevent the use of technical standards that impede Community manufacturers' access to all Member States.

The Commission has also adopted a directive designed to remove barriers to competition between EC suppliers of value-added services. The Directive on Telecommunications Services, adopted in June 1990, includes provisions designed to provide Community suppliers of services, such as message recording and relaying, transactions, data processing and interactive services, with access to the national telecommunications networks of all Member States.[76] It also provides that, as of January 1, 1993, companies will be able to resell leased line capacity to the public.

A further important step toward the opening of the Community's telecommunications markets was accomplished in June, 1990 with the adoption of the EC Council Open Network Provisions (ONP) Directive,[77] This directive is intended to deal with potential impediments to competition created by different national standards for technical interfaces and conditions of use, as well as discriminatory tariffs. It provides for the development of voluntary community-wide technical interface standards by the European Telecommunications Standards Institute. The use of these standards can be made mandatory if this is considered necessary to provide EC services and equipment suppliers with the opportunity to operate throughout the Community. The ONP Directive also includes a future work programme for further integrating the Member States' national telecommunications networks.

1.3 Banking and Insurance

The opening of EC markets for banking and insurance was recognized in the White Paper on Completing the Internal Market as an important part of the Europe 1992 initiative. The White Paper included as a major objective, the creation of conditions permitting the free circulation of "financial products" within the Community. This was to be achieved through the creation of harmonized standards for the supervision of financial institutions and conditions for entry into the Member States.[78]

(i) Banking Services

Since the release of the White Paper on Completing the Internal Market, a number of measures aimed at creating a more unified EC banking sector have been adopted or proposed.[79] The key development, however, has been the adoption, in December 1989, of the Second Banking Directive.[80] Under this Directive, banks obtaining a licence in one Member State will be able, as of January 1, 1993, to provide services and establish branches throughout the Community. The supervision of banks under the Directive will primarily be the responsibility of their home state.

It should be noted, however, that the benefits of the single EC banking licence will not be automatically available to banks based in third countries. These banks, if they are already authorized to provide services within the Community, may be able to take full advantage of the integrated market.[81] Banks that are not already authorized to provide services within the Community may, however, find their access to EC markets to be contingent upon their home country's treatment of European banks. The Second Banking Directive provides for the possible suspension of authorizations for third country banks in cases where Community banks "do not receive national treatment offering the same competitive opportunities (in the third country) as are available to domestic institutions."[82]

(ii) Insurance

The approach being taken toward the integration of EC markets for insurance parallels the approach that has been adopted in the Second Banking Directive. The basic objective is to establish a single licence that will allow suppliers of different forms of insurance, subject to control by one Member State, to establish branches and conduct business in all Member States. This has already been accomplished with respect to large industrial and commercial risks non-life insurance (i.e. for commercial enterprises having more than 500 employees).[83] Other steps that have been taken by the EC Commission to open Community markets for non-life insurance have included the publication, in June 1990, of a draft directive for certain types of motor vehicle insurance, and the release, in August 1990, of a proposed directive to establish a single EC licence and home country control for all types of non-life insurance.[84]

The progress that has been made so far in the field of life insurance has been more modest. The Council of Ministers has reached agreement on the substance of a proposed directive on life insurance that would give policyholders greater freedom to obtain life insurance outside of their home state.[85] Consensus has not yet been reached, however, on the full integration of the EC life insurance sector along the lines that are being followed in other financial services areas.

1.4 Public Procurement

Public procurement is a major source of economic activity within the EC. It accounts for about 15 percent of the Community's total GDP, including a large share of total EC demand for products such as office, data-processing and electrical machinery, telecommunications equipment, measuring and electro-medical equipment, railway and tramway rolling stock, and aero-space equipment.[86] At the outset of the Europe 1992 initiative, however, competition for public contracts was severely restricted by widespread use of procurement practices favouring suppliers from the purchasing Member State. To remedy the situation, the 1985 White Paper on Completing the Internal Market included a number of proposals for enhancing the access of Community-based companies to public procurement in all Member States.[87]

A number of the measures called for in the White Paper have been adopted. Two directives have been implemented for the purpose of strengthening the Community's procurement rules on major public contracts for supplies and public works other than in the water, energy, telecommunications and transportation sectors.[88] The directives were designed to close a number of the loopholes under the pre-existing procurement rules that were being used to avoid following competitive contracting procedures.[89] They also incorporated a number of procedural changes, such as the use of longer periods for the tendering process, that are intended to promote more effective Community-wide competition for public contracts.

A critical milestone in the White Paper public procurement programme was reached in September 1990 with the adoption of a directive on public purchasing in the four sectors not covered by the above-mentioned procurement directives.[90] The Utilities Directive outlines competitive procurement procedures for the granting of major supplies and construction contracts by public entities in the water, energy, telecommunications and transportation sectors. These procedures must be followed by both government controlled organizations and private companies having special or exclusive rights in the relevant sectors. Procurement subject to the Utilities Directive includes, with certain exceptions: (1) public works contracts in the relevant

sectors that are valued in excess of 5 million ECU (about $8 million Cdn.); (2) water, energy and transportation supplies contracts worth more than 400,000 ECU (about $640,000 Cdn.); and (3) telecommunications supplies purchases valued in excess of 600,000 ECU (about $960,000 Cdn.).[91]

The treatment of non-EC bids has been a controversial issue during the negotiations on the Utilities Directive. As adopted, the Directive, requires that bids having more than 50% EC content, in general, be given a minimum preference over third country bids equal to 3% of the value of the contract. The Utilities Directive, however, places no obligation on the Member States to accept third country bids in cases where they are low enough to overcome the 3% Community preference. Rather, the Member States can give EC bids a higher cost advantage, or even refuse to consider non-EC bids, unless the relevant third country has signed a reciprocal procurement agreement with the EC on the relevant sector.[92]

Another major step toward the completion of the White Paper program on public procurement was taken in September, 1990, with the release of a long-awaited EC Commission proposal for a procurement directive on services.[93] The proposed directive would cover public procurement of most services, including insurance, transportation, market research, advertising and others.[94] It would require the use of competitive procurement practices by public entities for most services contracts valued in excess of 200,000 ECU or, in the case of architecture, for contracts relating to buildings valued in excess of 5 million ECU. However, as in the case of the Utilities Directive, these procedures may have a limited effect on non-EC bids. Rather, the services directive provides for treatment of these bids that is based on the treatment of EC company bids for services contracts in the relevant non-EC country.

EC authorities have also adopted a number of measures since 1985 that are intended to promote stricter adherence to the Community's rules on public purchasing. To ensure effective application of the amended supplies and public works procurement directives, the EC Council, in December 1989, adopted a further directive on procedures for reviewing the awarding of related contracts.[95] This directive requires that the Member States establish effective procedures for private

businesses or the EC Commission to obtain remedies for infringements of the amended supplies and public works procurement rules. A proposal for similar review procedures for contracts coming under the Utilities Directive was released by the EC Commission during July, 1990.[96]

Finally, the EC has also taken steps to curtail the use of Member State procurement practices favouring economically depressed regions. In a 1989 policy statement, the EC Commission rejected the use of such preferences in relation to contracts coming under the EC public procurement directives. Although this statement did not rule out the use of regional preferences in relation to smaller contracts, it provides that such preferences should be transparent and open to examination by the Commission while not having a significant impact on intra-EC trade and competition.[97]

2. Competition Policy Development in Highly Restricted Areas of the European Economy

EC competition legislation has been upheld as applicable to private restraints of competition even in highly regulated sectors such as air travel, telecommunications and financial services. However, the potential effectiveness of EC competition policy in these sectors has been limited by regulatory and other restraints on entry, pricing and other forms of competition. The removal of these restraints in connection with the Europe 1992 initiative, therefore, should greatly expand the scope for promoting competition through active enforcement of Articles 85 and 86 of the EEC Treaty. Indeed, as noted above, effective application of the EC competition rules may be necessary to ensure that anti-competitive regulations are not replaced by private arrangements having the same effect.

The extension of EC competition policy into previously highly restricted areas of the European economy has become a major source of activity for EC competition authorities. In the air travel sector, there have been numerous investigations under Articles 85 and 86 of the EEC Treaty into potentially anti-competitive arrangements. For example, in one recent case, EC competition authorities examined a proposal by Air France to acquire two smaller French air carriers.[98] This case was resolved by an

agreement between Commissioner Brittan, the French government and Air France to open a number of French air routes to new competition. In an earlier case, EC competition authorities obtained amendments to a proposed merger between British Airways and British Caledonian to prevent the possible erosion of competition on routes between the U.K. and other countries.[99] These concessions were obtained in addition to ones that had already been demanded by U.K. competition authorities.[100]

The development of regulations dealing with the application of the EC competition rules in the air travel sector has also been an important area of activity for EC competition authorities. Such regulations were an important part of the first package of air travel reforms adopted during 1987.[101] In order to place EC competition authorities in a better position to obtain information and conduct investigations in the air travel sector, these regulations established formal procedures for the notification of related restrictive agreements or practices. In addition, to promote greater legal certainty concerning the application of competition policy in the air travel sector and facilitate the transition to more competitive markets, the regulations outline a number of types of agreements that are considered not to infringe the EC competition rules. In order for these arrangements to qualify for an exemption, however, they must meet conditions that are designed to limit their potential anti-competitive effects.

EC competition authorities have also been highly active in the European telecommunications sector. An important step toward the extension of Community competition policy in this sector took place during 1989 with an intervention by EC competition authorities into the operations of the European Conference of Postal and Telecommunications Administrations (CEPT).[102] CEPT is an organization representing the telecommunications administrations of 26 European countries including the EC Member States. The Commission found that a recommendation made by the organization for the fixing of leasing terms for international telecommunications circuits constituted a violation of Article 85 of the EEC Treaty. This finding represented the first time that the EC competition rules have been applied to CEPT activities. EC competition authorities, as indicated by a recent investigation into arrangements relating to international telephone charges in the

Community, are continuing to promote the extension of competition policy in the telecommunications sector.[103]

In the financial services sector, EC competition authorities have been active in the promotion of greater competition in the pricing of services offered by banks through the abandonment of interbank agreements on interest rates. In a communication to the European Banking Federation, the EC Commission indicated that such agreements should be avoided on the basis that they are restrictive of competition.[104] This communication arose out of a number of investigations that the Commission had made into banking association agreements on service charges. In the area of insurance, EC competition authorities have been involved in the drafting of regulations relating to permissible agreements and arrangements on risk premiums, policy conditions, claim settlement and other insurance-related matters.[105]

3. The Implications for Canada

The measures examined in this section of the report reflect a strong commitment on the part of EC authorities to create open and competitive markets in previously highly restricted areas of the European economy. In spite of national sensitivities, progress toward this goal is being accomplished in the areas examined in this section and other areas, such as energy, through the elimination of regulatory and other government imposed restraints on competition, as well as strict application of the EC competition rules.[106]

3.1 The Competitive Implications for Canadian Businesses

The opening of previously highly restricted EC markets presents new opportunities as well as challenges for Canadian businesses. As indicated by other studies in this series, the removal of the remaining Member State imposed restraints on competition is creating new competitive opportunities not only for European firms, but also for Canadian firms that are able to gain access to the Community's markets. Many of the European markets that are being opened are potentially of major importance for Canadian businesses.

As has also been shown in other studies in this series, however, the potential benefits may be greatest for Canadian companies which have operations in the Community or alliances with EC-based companies. Provisions, such as those in the Utilities Directive favouring EC-based companies, may make it more difficult for Canadian businesses to gain access to integrated Community markets from a Canadian base. At the same time, however, there is the danger that the ability of Canadian businesses to establish operations in the EC will be impaired by reciprocity provisions, such as those in the Second Banking Directive. Such provisions will make it increasingly important for Canadian businesses to consider the possible negative implications that the promotion of protective measures in Canadian markets may subsequently have on their access to EC markets.

The opening of highly restricted EC markets is also likely to create new competitive challenges for many Canadian businesses. Many of the areas of the European economy that are being liberalized are ones in which European suppliers have tended to be small and inefficient relative to their competitors in other jurisdictions. The widespread use of regulatory and public procurement restraints of intra-EC competition has been a major contributing factor. These restraints have frequently been used to maintain inefficient domestic production in the Member States, or have had the effect of limiting EC companies to small national markets within the Community.

The emergence of more efficient European companies in many industries, therefore, is expected to accompany the lowering of the remaining regulatory and institutional barriers to competition between the Member States. The European industries in which high efficiency gains are expected include many, such as telecommunications equipment and banking, that are potentially important for Canadian businesses.[107] EC companies that develop in these areas will have the benefit of relatively secure access to potential markets of 340 million people. This should make them strong competitors not only in the Community, but also in Canadian, U.S. and other countries' markets.

The opening of previously highly restricted areas of the European economy may also increase the exposure of many Canadian companies' EC operations to the Community's rules on competition. Arrangements that might have been acceptable in markets that were previously highly restricted (e.g. territorial restrictions relating to trade between the Member States) may be subject to stricter competition policy treatment as the remaining barriers to intra-EC competition are lowered. The EC competition policy treatment of many arrangements may differ from Canada's. For example, the EC competition rules on territorial restraints tend to be much stricter than Canada's due to the fundamental EEC Treaty goal of promoting integration of the Member States' markets.[108]

3.2 Public Policy Implications

The efforts being made to open previously highly restricted areas of the European economy raise a number of issues for Canadian public policy. As progress toward the completion of the internal EC market continues, it will be increasingly important to ensure that government intervention in the Canadian marketplace does not impede the competitiveness of Canadian businesses in world markets. The measures that are being put in place in the EC, even when they do not create a more liberal regulatory regime within the Community than currently exists in Canada, are particularly important to consider since they pertain to a region encompassing 340 million people. These measures, therefore, may be capable of promoting high levels of competition and efficiency in areas where the Canadian economy alone cannot, due to our relatively small and highly dispersed markets.

Against this background, the use of Canadian government policies, in areas such as public procurement, telecommunications and financial services, that create undue inter-provincial or other barriers to competition within Canada, or unnecessarily shelter Canadian companies from external competition, are likely to pose an even greater threat to Canadian international competitiveness. Canadian companies that develop in small protected domestic markets will be less likely to develop the capability to compete in international markets that include more efficient EC competitors. Rather, the small size of the Canadian economy will

represent an even greater handicap in the future for inward looking as opposed to outward looking Canadian economic policies.

The reciprocity provisions being implemented in the areas examined in this section and other parts of the European economy are a further important issue for future Canadian public policy. Such provisions are likely to make Canadian access to EC markets for financial services, telecommunications equipment and other goods and services largely dependant on the treatment of EC companies under Canadian public policy. Accordingly, the maintenance of strong cooperative relationships between Canadian and EC public officials on regulatory and other policy issues should be a continuing priority.

The developments outlined in this section, rather than diminishing the importance of multilateral and bilateral trade agreements for Canada's economic future, further emphasize their necessity for Canadian businesses. As indicated by its use of reciprocity provisions, the EC is unlikely to unilaterally open its markets to producers from other countries. The trend away from regulatory and other restraints on intra-EC competition, however, is increasing the potential benefits that international trade agreements, such as the GATT, may provide to Canadian exporters by increasing their access to Community markets. The movement toward more open and competitive markets in the European economy will also place increased importance on Canada's trade relations with the U.S. Assured access to large U.S. markets will be even more critical for Canadian businesses in the future if they are to be capable of competing against European companies having potential access to domestic markets of up to 340 million people.

Finally, the opening of previously restricted areas of the European economy further emphasizes the importance of active enforcement of Canadian competition policy. Canadian companies that use private arrangements to avoid competing in their domestic markets will be less capable later of meeting the challenge posed by more efficient European companies. At the same time, Canadian competition authorities will have to be increasingly aware of the competitive pressures exerted on Canadian producers by Community-based companies when applying the Competition Act in Canada.[109]

VI. SUMMARY OF BUSINESS AND POLICY IMPLICATIONS

The Europe 1992 initiative has led directly and indirectly to a substantial strengthening of EC competition policy. The drive to complete the common market has provided the impetus required for the adoption of the Merger Control Regulation. In addition, the programme outlined in the EC Commission White Paper on Completing the Internal Market has led to major changes in EC competition policy respecting state aids, as well as promoted the development of competition policy in previously highly restricted areas of the European economy.

1. Implications for Canadian Businesses

These developments have a number of potential implications for Canadian businesses. The implementation of the EC Merger Control Regulation is an important development with respect to the ability of Canadian companies to use mergers, acquisitions and other concentrations to establish or strengthen their presence in Community markets. The Regulation may help to reduce the costs and uncertainty associated with concentrations subject to EC competition policy by reducing some of the overlap of jurisdiction that has existed in this area between the Member States and the EC Commission. In addition, the time frame and procedures established in the Regulation may help to expedite the completion of some concentrations.

Currently, the Merger Control Regulation has limited potential to directly benefit small and medium-sized Canadian businesses. The threshold requirements contained in the Regulation, with some exceptions, should limit its application to mergers involving only very large Canadian companies. It should be noted, however, that mergers involving smaller Canadian companies may be more likely to come under the Regulation after 1993 when it is expected that the thresholds will be lowered. Also, the Merger Control Regulation may indirectly benefit some smaller Canadian companies. These companies may be less likely to have mergers and acquisitions scrutinized by both the EC Commission and the relevant Member States. Rather, the Commission may be reluctant to use its limited resources to

examine smaller mergers knowing that they will also be reviewed by the Member States.

Canadian companies that may be involved in concentrations covered by the Merger Control Regulation, should be aware of the strict time limits it imposes for notification. Arrangements covered by the Regulation must be correctly notified to the EC Commission within one week of the completion of a binding agreement. Delayed or incomplete notification of concentrations can slow their approval as well as result in fines. The information required to complete notification can be extensive. Accordingly, companies that are involved in concentrations that may come under the Merger Control Regulation might be well advised to start collecting the necessary information during the negotiation phase. In addition, it may be advisable to take advantage of less formal channels for prenotifying the EC Commission of proposed concentrations. This may help to clarify whether the Regulation is applicable to a particular concentration, as well as the nature and amount of information that the Commission will require for notification.

The evaluation of concentrations under the Merger Control Regulation should be based primarily on their implications for competition in the relevant EC markets. The Regulation, however, provides some potential for the social and industrial policy objectives of the EC and Member States to influence decisions. Companies that are involved in concentrations coming under the Regulation may, therefore, be required to deal with objections relating to both competition issues and broader policy concerns. It should also be noted that business arrangements that may come under the Merger Control Regulation are not limited only to concentrations among companies having operations in the EC. Rather, EC authorities may also attempt to apply the Regulation to concentrations in other countries that meet the Regulation's size and EC sales thresholds. These concentrations may not only include mergers and acquisitions, but also certain joint ventures, export consortia and other business arrangements that involve some transfer of control of a company.

The direct impact on Canadian businesses of the efforts being made to strengthen EC competition policy on state aids should be generally favourable.

Stricter controls on state aids, to the extent that they can be established and maintained, should help to reduce the scope for Member States to intervene in European markets to prop up inefficient businesses, promote national champion or state-owned companies, or promote certain other industrial and social policy objectives. As a consequence, Canadian companies should be less likely, overall, to have their competitive position in EC markets undermined by Member State subsidies.

The potential benefits of the efforts being made to control state aids, however, should not be overestimated. The EC Member States will continue to have broad scope for granting state aids for regional, social and industrial policy aims that are considered to be consistent with the EEC Treaty. In addition, there still exists strong resistance in many Member States against further restraints on their ability to intervene in their national economies, through, for instance, the provision of aid to state-owned enterprises. There is also the danger that stricter controls on Member State aids will be accompanied by increased grants of industrial aid under Community-wide programmes. This may create new competitive disadvantages for Canadian businesses in high technology, research and development and other areas in which the Community authorities are active.

The progress that is being made toward the elimination of regulatory and institutional barriers to competition between the EC Member States may greatly benefit Canadian companies that have established access to the European Community. As the completion of the internal market becomes further advanced, these companies will increasingly be operating in integrated European markets of up to 340 million people rather than fragmented markets in individual Member States. The directives that are being adopted to complete the internal market in areas such as public procurement, financial services and telecommunications may, however, be of limited potential benefit for companies attempting to export to the EC from Canada. Rather, these companies may find their access to the Community impeded by the use of EC content or reciprocity provisions in related regulations and directives. This is consistent with the theme that has been developed in other reports in this series, which is that Canadian businesses, in order to benefit more

fully from the opening of EC markets, may be required to establish operations in the Community or develop strategic alliances with EC-based companies.

Canadian companies may also find that the removal of legal and institutional barriers to competition in the EC is increasing their potential exposure to the Community's competition rules. EC competition authorities are actively enforcing these rules in previously highly restricted areas of the European economy. Canadian companies that may be affected should be aware of possible differences between the Canadian and EC competition policy treatment of restrictive trade practices such as territorial restrictions.

2. Public Policy Implications

The developments discussed in this report entail important concerns for Canadian public policy development. The efforts that are being made to establish open and competitive European markets will increase the competitive pressures on many areas of the Canadian economy. The European companies that will emerge from these markets are likely to offer formidable new competition for Canadian businesses not only in EC markets, but also in Canadian, U.S. and other markets. In addition to other possible advantages, these companies will have the benefit of assured access to integrated European markets of up to 340 million people.

Against this background, Canadian economic development will increasingly depend on the adoption of outward looking policies rather than policies that focus solely on domestic markets. The relatively small Canadian market, by itself, will be less effective in the future at generating companies that are able to compete successfully in world markets which include more efficient EC competitors. Accordingly, bilateral and multilateral trade arrangements, such as the GATT and the Canada-U.S. Free Trade Agreement, that provide Canadian businesses with access to larger markets will be even more important for Canadian competitiveness.

A related trade policy issue that has frequently been raised is the possibility that the Europe 1992 initiative will create new barriers to trade between the Community and third countries. This does not appear to be an immediate concern

with respect to the recent development of EC competition policy. The related measures that have been adopted do not contain provisions designed specifically to create new impediments against foreign businesses. There is, however, some cause for possible future concern. Depending on how they are applied, some of the provisions in the Merger Control Regulation, Second Banking Directive and other directives or regulations discussed in this report may create new barriers to Canadian access to EC markets.

A continuing commitment to strong competition policy in the EC would help to ensure that the developments discussed in this report will not eventually result in substantial new trade barriers against the Community's external trade. As illustrated by the evolution of the Merger Control Regulation, such a commitment may be instrumental in preventing other policy objectives that may be more harmful to Canadian interests, such as protectionist industrial policies, from possibly having a greater influence on the development of EC legislation. A continuing strong commitment to competition policy principles would also help to reduce the potential for Canadian interests to be harmed by the influence other policy objectives might have on the future application of EC legislation in areas such as merger control, state aids, telecommunications and financial services.

It should not be taken for granted, however, that competition policy principles will play as dominant a role as they have in the past in the development and application of competition and other related legislation in the European Community. Rather, the make-up of the EC Commission, which includes Commissioners having responsibility for many other areas of Community policy, combined with the Commission's role in the enforcement of the Community's competition rules, may result in other policy objectives obtaining greater prominence in the future. This might occur if, for example, a relatively weak Commissioner is appointed in the area of competition policy, or other events, such as the possible failure of the current GATT negotiations or a European recession, increase the protectionist pressures on the EC Commission.

It will be important, therefore, for public officials and business interests in Canada to monitor the future development and application of competition related

legislation in the EC, and be capable of effectively representing Canadian interests. This will require the establishment or maintenance of strong cooperative relationships between key public authorities in the EC and Canada. Over the longer term, it may also require the adoption, in an EC context, of more formal measures for cooperation, such as the Canada-U.S. Memorandum of Understanding With Respect to the Application of National Antitrust Laws.[110]

The developments examined in this report will also be important factors for consideration in future Canadian domestic policy development. The use of reciprocal treatment provisions in Community directives and regulations on public procurement, merger control, financial services and other areas is increasing the interdependence between Canadian policy developments and the access of Canadian businesses to EC markets. Canadian policy, therefore, will be required to take greater account of the Community's economic and regulatory legislation, as well as that of the U.S. and our other major trading partners, when designing legislation for Canada. Also, it will be even more important for Canadian domestic policies to promote the development of competitive and efficient domestic markets. With more efficient EC competitors, the use of regulatory, procurement, subsidy and other policies that create unnecessary inter-provincial barriers to trade or restrict competition between Canadian firms will pose an even greater threat to the development of internationally competitive Canadian industries. Similarly, Canadian companies that are able to use private arrangements to restrain competition will be less likely to become internationally competitive. Accordingly, it will continue to be important to have an effective competition policy framework in place in Canada.

NOTES

1. European Economic Community, EEC Competition Policy in the Single Market (Luxembourg: Office for Official Publications of the European Communities, 1989), p. 9.

2. Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council (Luxembourg: Office for Official Publications of the European Communities, 1985), p. 39.

3. For example, see European Parliament, Session Documents, Document A2-0260188, November 11, 1988.

4. See Peter Sutherland (Former EC Commissioner Responsible for Competition Policy), The Role of Competition Policy on the Way to 1992, address to the 2nd World Surfactants Conference, Paris, May 24, 1988, p. 6.

5. Commission of the European Communities, supra, note 2, p. 39.

6. See Douglas E. Rosenthal, "Competition Policy," in Gary C. Hufbauer (Editor), Europe 1992: An American Perspective (Washington, D.C.: The Brookings Institution, 1990), at p. 300.

7. Those who are interested in more detailed commentary on the provisions of the Merger Control Regulation and the possible treatment of concentrations under the Regulation may now consult a number of references. These include, for example, Barry E. Hawk, "The Merger Regulation: The First Step Toward One-Stop Merger Control," Antitrust Law Journal, vol. 59, issue 1, 1990, pp. 185-235, James S. Venit, "The Merger Control Regulation: Europe Comes of Age... or Caliban's Dinner," 1990 CMLR 7, and the papers presented at the Fordham Corporate Law Institute Seminar on International Mergers and Joint Ventures held in New York, October 18-19, 1990, especially sessions 4-6.

8. Europemballage & Continental Can Co. v. the Commission, 1973 ECR 215, CMR 8171 at p. 8300.

9. This view was set forth by the Commission in the memorandum, Le Problème de la concentration dans le marché commun, Etudes CEE, Série Concurrence No. 3, 24 (1966). For discussion of the history of merger regulation in the EC, see, for example, Barry E. Hawk, United States, Common Market and International Antitrust: A Comparative Guide (Clifton N.J.: Prentice Hall Law & Business/Harcourt Brace Jovanovich, Publishers, update service), vol. II, chapter 13.

10. The 1966 Memorandum, id., actually adopted the position that Article 85 does not apply to agreements relating to the transfer of either whole or part ownership of enterprises.

11. British American Tobacco Co. Ltd., et al. v. the Commission, CMR 14,405.

12. For an analysis of this case, see, for example, Frank L. Fine, "The Phillip Morris Judgment: Does Article 85 Now Extend to Mergers," 1987 ECLR 333. Also see the opinion of the EC Advocate General in this case, CMR 14,405, at p. 17,776.

13. See CMR 10,981.

14. See Council Regulation (EEC) No. 4064/189, of 21 December 1989 (The Merger Control Regulation), OJ No L 395, 30.12.1989, Article 3.

15. For further discussion of the potential application of the Merger Control Regulation to joint ventures, see, for example, James S. Venit, "The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast" (Draft), presented at the Fordham Corporate Law Institute Seminar on International Mergers and Joint Ventures, New York, October 18-19, 1990.

16. Merger Control Regulation, Article 1.

17. Francesco Gianni, "Merger Control Under EEC Law," in Acquisitions and Investment in the New Europe: The Legal and Strategic Environment, a collection of papers presented at a conference chaired by Thomas P. D'Aquino in Toronto, May 30, 1990, p. 8.

18. Id., Article 21.

19. Id., Article 21(3). Other recognized interests include plurality of the media and prudential rules. The designation of any other interest as legitimate is subject to review by the EC Commission.

20. Id., Article 9.

21. Sir Leon Brittan (EC Commissioner Responsible for Competition Policy), Competition Policy in the European Community: The New Merger Regulation, Address to the EC Chamber of Commerce, New York, March 26, 1990.

22. The potential application of Articles 85 and 86 of the Merger Control Regulation to concentrations not having a Community dimension is discussed in Christopher Jones, "The Scope of Application of the Merger Regulation" (Draft), presented at the Fordham Corporate Law Institute Seminar on International Mergers and Joint Ventures, New York, October 18-19, 1990, section III(5).

23. The introduction to the Regulation includes the presumption that concentrations between undertakings having only limited market share, less than 25%, in the whole or a substantial part of the common market are unlikely to have such effects.

24. Merger Control Regulation, Article 2(1)(a).

25. See sections 93 and 96 of the Competition Act, (1986) R.S., c. C-23, as compared to Article 2(1) of the Merger Control Regulation.

26. The potential for factors other than those relating to competition to influence the analysis of concentrations under the Merger Control Regulation has been raised by a number of commentators including, among others, James S. Venit, supra, note 15.

27. See, generally, Form Co. Relating to the Notification of a Concentration Pursuant to Council Regulation (EEC) 4064/89, reprinted in OJ No L 219, 14.8.1990.

28. Id., Annex I, Introduction.

29. Merger Control Regulation, Article 14.

30. Id., Article 4(2).

31. Id., Article 18.

32. Id., Articles 8(2)-(3), 14 and 15. If the conditions for making a concentration compatible with the common market are not complied with, the Commission can impose periodic penalty payments of up to 100,000 ECU per day.

33. Id., Articles 8(4), 15(2)(c) and 14(2)(b).

34. For discussion of the relevant legislation of the Member States, see Barry E. Hawk, supra, note 7, pp. 227-32.

35. The specific requirements for such arrangements to come under the Regulation are set forth in Article 3 of the Regulation and the related guidelines.

36. For discussion, see Antitrust & Trade Regulation Report (BNA), vol. 59, September 27, 1990, pp. 465-66.

37. For example, see "EC Practitioners Question Ability to Deliver Effective Merger Review," Antitrust and Trade Regulation Report (BNA), vol. 58, November 1, 1990.

38. Antitrust and Trade Regulation Report (BNA), supra, note 36.

39. The overall implications of the Regulation for the costs of completing concentrations may be mixed. One one hand, the potential reduction of overlapping jurisdiction over these mergers may, to some extent, reduce duplication of procedures. On the other hand, it has been asserted that the strict deadlines and informational requirements under the Regulation may actually increase costs (i.e. see "EC takeover rules: The Brussels fiasco," Observer, September 23, 1990).

40. See the comments of Sir Gordon Borrie, Director General of the UK Office of Fair Trading, as reported in the Antitrust and Trade Regulation Report (BNA), vol. 58, March 1, 1990, p. 323.

41. For example, see United States International Trade Commission, The Effects of Greater Economic Union Within the European Community on the United States: First Follow-Up Report (Washington, D.C.: USITC Publication 2266, Investigation No. 332-267), p. 9-8.

42. See Bernd Langeheine, Substantive Review Under the EEC Merger Regulation (Draft), presented at the Fordham Corporate Law Institute Seminar on International Mergers and Joint Ventures, New York, October 18-19, 1990, p. 4.

43. Antitrust and Trade Regulation Report (BNA), vol. 56, February 9, 1989, p. 231.

44. See "UK Studies EC Commission, Pushes for Independent Cartel Agency," Antitrust & Trade Regulation Report (BNA), vol. 59, September 27, 1990, pp. 469-70.

45. Sir Leon Brittan, supra, note 21, p. 49.

46. Commission of the European Communities, First Survey on State Aids in the European Community (Brussels: 1989), and Second Survey on State Aids in the European Community in the manufacturing and certain other sectors (Brussels: July 1990).

47. See the Second Survey on State Aids, p. 15.

48. Id., p. 10.

49. This has been the case in some major aid cases that have taken place in the last year. For example, see "Brittan rebuffed over EC state aid," Financial Times, July 26, 1990, "France and EC agree to deal on Renault aid," Financial Times, May 23, 1990, and "Commission requires Germany to accept state aids framework for motor industry," CMR 95,409.

50. As stated by one commentator, "Governments never end programs, they just keep piling them up - and today some of them no longer correspond to economic realities." See 1992 Implications of a Single European Market: Part I Effects on Europe (Ottawa: External Affairs Canada, 1989), p. 92.

51. Sir Leon Brittan (Vice President of the Commission of the European Communities), A Bonfire of Subsidies? A review of state aids in the European Community, address to the 1992 Update London Seminar on Competition Policy, March 10, 1989.

52. In line with this more positive approach to the treatment of subsidies, Commissioner Brittan also expressed the intention to create simplified procedures for dealing with small state aid schemes that are unlikely to significantly affect intra-EC trade. These guidelines were released during December, 1989.

53. See "EC urges four states to scrap industrial subsidies," Financial Times, July 20, 1990, p. 1.

54. Commission of the European Communities, Eighteenth Report on Competition Policy (Luxembourg: Office for Official Publications of the European Communities, 1989), p. 145.

55. See the Community Framework on State Aid to the Motor Vehicle Industry, OJ No C 123, 18.5.1989. The Framework on State Aid to the EC Motor Vehicle Industry was not greeted with unanimous approval by the EC Member States. Both Spain and Germany initially refused to comply with its notification requirements. However, Spain subsequently acceded to the framework after a procedure was opened against the two countries under the EEC Treaty (EC Commission Press Release IP(90)311). In February 1990, a negative decision was made against Germany requiring the country to fulfil the notification requirements of the Framework (EC Commission Press Release IP(90)150). The Framework is scheduled for review after two years of operation.

56. For the Framework on State Aid for R&D, see OJ No C 83, 11.4.1986.

57. For discussion of this case, see CMR 95, 483 and "France and EC agree to deal on Renault aid," Financial Times, May 23, 1990, p. 1.

58. See EC Commission, Press Release IP(90)511, June 27, 1990. In an earlier case, the EC Commission also demanded the repayment of substantial aid to the Italian government in connection with the sale of Alfa Romeo to Fiat. See OJ No L 394, 30.12.1989.

59. For example, the Commission recently approved a substantial amount of aid provided by the Spanish government to Enasa (OJ No L 367/62, 16.12.1989), the granting of aid to Ford Motor Co. for the establishment of a plant in Portugal (EC Commission Information IP(89)693) and aid given to Daimler Benz by the German government ("Brittan rebuffed over EC state aid," Financial Times, July 26, 1990)

60. EC Commission Press Release IP(90)195.

61. Id.

62. "Brittan on the trail of aid to state companies," Financial Times, November 19, 1990.

63. For example, some commentators have viewed the recent efforts by Commissioner Brittan to obtain the repayment of subsidies by the Franch state-owned car manufacturer, Renault, as an attack on the mixed enterprise system operated by France and other EC countries. For discussion, see "Sir Leon and the subsidy mountain," The Economist, June 9, 1990, p. 13.

64. EC Commission Press Release, IP(88)813, December 15, 1988.

65. For discussion, see id., and 1992 Implications of a Single European Market, supra, note 50, pp. 92-3.

66. Commentary on this case is provided in the Competition Law Bulletin (Linklaters & Paines, Summer 1990), pp. 22-23.

67. OJ No C 212, 12.8.1988.

68. OJ No C 83, 11.4.1986.

69. See "EC Commission Reports on Advancement, Implementation of Competition Policy," Antitrust and Trade Regulation Report (BNA), vol. 59, August 23, 1990, pp. 312-13.

70. See the Second Survey on State Aids, Annex II, Table IA.

71. For a more detailed description of the market-opening measures that have been adopted in the EC air travel sector, see, for example, Randolph Gherson (Chief Air Negotiator, Department of External Affairs, Canada), The European Community's Common Air Transport Policy and Implications for Bilateral Service Agreements Between Member States and Third Countries, presented at the Canadian Bar Association, 75th Annual Meeting, London, September 24-27, 1990.

72. See "EC considers third stage to open up air transport," Financial Times, August 29, 1990.

73. Id.

74. See Commission of the European Communities, COM(87) 290, Brussels, 30 June 1987.

75. See EC Commission Directive of 16 May 1988 on competition in the markets in telecommunications terminal equipment (88-301-EEC), OJ No L 131, 27.5.1988. It should be noted, however, that the Commission's legal basis for adopting this Directive has been disputed (See Europe, 17 February 1990, no. 5196 (new series), p.11.).

76. See Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (90-388-EEC), OJ No L 192, 24.7.1990.

77. See Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (90-387-EEC), OJ No L 192, 24.7.1990.

78. See Commission of the European Communities, supra, note 2, pp.27-29.

79. A survey of these measures is provided in the Final Report of the EC 1992 Working Group on Financial Services (Ottawa: Department of External Affairs and International Trade, December, 1990).

80. See Second Council Directive of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77-780-EEC, (89-646-EEC), OJ No L 386, 30.12.1989. Passage of the Second Banking Directive was made possible by the adoption at the same time of the Solvency Ratio Directive for banks.

81. This is the view expressed in Jean-François Bence, Europe 1992 and Canada (Report prepared for the House of Commons Standing Committee on External Affairs and International Trade), July 1990, p.15.

82. Second Council Directive, supra, note 80, Article 9(4). This Article also requires that the conditions for effective market access to the third country be fulfilled.

83. See the Second Council Directive of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, OJ No L 172, 4.7.1988. The threshold number of employees for this Directive after 1992 is 250.

84. See the Amended Proposal for a Council Directive amending, particularly as regards motor vehicle liability insurance, First Council Directive 73/239/EEC and Second Council Directive 88/357/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance, COM(90) 278, 20.6.1990, and the Proposal for a Third Council Directive on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73-239-EEC and 88-357-EEC, COM(90) 348 final - SYN-291, Brussels, 31 August 1990, p. 2.

85. See Amended Proposal for a Second Council Directive on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services amending Directive 79-267-EEC, COM(9) 46 final SYN-177, Brussels, 1 March 1990.

86. See Commission of the European Communities, "Public Procurement in the Excluded Sectors," Bulletin of the European Communities, Supplement 6/88.

87. Commission of the European Communities, supra, note 2, pp. 23-24 and Annex, p. 22.

88. See Council Directive of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, OJ No 210, 20.5.1988 and Council Directive of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, OJ No L 210, 21.7.1989.

89. The specific amendments adopted included provisions to clarify the definition of contracts subject to the procurement rules, narrow the definition of exempted entities and contracts, and make the use of available Community technical standards mandatory. In addition, the revised directives include measures to prevent the splitting or under-evaluation of contracts to lower their value below the thresholds requiring the use of competitive contracting procedures. These thresholds are, in the case of supplies contracts, 200,000 ECU (130,000 ECU if subject to the GATT Procurement Code) and, in the case of public works, 5 million ECU. Most Member States were required to fully implement these amendments by July 19, 1990.

90. See "EC opens up public procurement," Financial Times, September 18, 1990, p. 4.

91. There are several noteworthy exceptions to this coverage. For example, pending further development of EC energy policy, certain energy purchases are currently not subject to the Utilities Directive. Also, procurement relating to air and sea transportation is exempt on the basis that it is already competitive. In addition, purchases relating to drinking water but not other water are covered by the Directive.

92. See Europe, No. 5201 (new series), February 24, 1990, p. 6.

93. For discussion of the proposed directive, see Europe, No. 5334 (new series), September 22, 1990, p. 11.

94. Id. The proposed directive, however, excludes legal, hotel, catering and certain other services.

95. See Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC), OJ No L 395, 30.12.1989. These procedures must provide for the possible suspension of contract proceedings until an infringement of the procurement rules is corrected, or for the awarding of damages to persons harmed by an infringement of the procurement rules.

96. See Commission of the European Communities, Proposal for a Council Directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (COM(90) 297), July 30, 1990. The proposals for the water, energy, transport and telecommunications sectors, however, differ in a number of respects from the measures contained in the supplies and public works procurement directives. For example, Chapter 2 of the proposed directive sets forth an alternative approach for dealing with infringements of the Utilities Directive procurement rules in cases where the relevant Member State considers that remedies, such as the suspension of award procedures or the setting aside of decisions of the contracting body, are inappropriate.

97. Commission of the European Communities, Public Procurement: Regional and Social Aspects, COM(89) 400, July 24, 1989. The communication suggests that permissible preferences might include, for example, the granting of a transparent price advantage to firms in poor regions in the range of 5 to 10%.

98. See "Air France Wins EC Approval for Acquisition: Terms Call for Paris to Liberalize Policies," Wall Street Journal, October 31, 1990.

99. See EC Commission Press Release, IP(88)131, March 9, 1988, CMR 10, 981.

100. For other cases, see EC Commission Press Release, IP(90)521, June 27, 1990, and CMR 95, 252, 95, 253, 95,472 and 95,391.

101. See, in particular, EC Council Regulation Nos. 3975/87 (CMR 2831) and 3976/87 (CMR 2755), and EC Commission Regulation Nos. 4261/88 (CMR 2833), 2671/88 (CMR 2758), 2672/88 (CMR 2761) and 2673/88 (CMR 2764). The

EC Commission is reviewing these exemptions which are due to expire by the end of 1992.

102. See EC Commission Press Release, IP(90)188, March 6, 1990.

103. EC Commission Press Release, IP(90)441, June 1, 1990. See also CMR 95, 581 and 95, 389 for other recent investigations in the telecommunications area.

104. EC Commission Press Release, IP(89)869, November 16, 1989.

105. See CMR 95, 375.

106. For discussion of proposals for opening EC markets for energy, see Commission of the European Communities, The Internal Energy Market: First Progress Report, COM(90) 124 final, Brussels, May 18, 1990.

107. A number of areas in which substantial efficiency gains are expected are developed in Paolo Cecchini, The European Challenge 1992: The Benefits of a Single Market, (Brookfield Vt.: Wildwood House, 1988).

108. The different Canadian and EC competition policy approaches on territorial restrictions are outlined in R. Anderson, P. Hughes, S. Khosla and M. Ronayne, Working Paper on Intellectual Property Rights and International Market Segmentation: Implications of the Exhaustion Principle (Ottawa: Consumer and Corporate Affairs Canada, Economics and International Affairs Branch, October, 1990.).

109. The provisions of the Competition Act, as amended in 1986, are designed to provide the flexibility required for Canadian competition authorities to take adequate account of increases in international competitive pressures on Canadian businesses. This is seen in the merger provisions of the Competition Act where the extent of effective foreign competition is one of seven factors defined explicitly in the statute to be applied in the Competition Bureau's merger review process. This flexibility is also seen in the Competition Bureau's approach to market definition which takes account of potential competition from the EC and other foreign jurisdictions. These and other aspects of the Competition Bureau's approach to merger enforcement will be outlined in the Competition Bureau's Merger Guidelines which have been distributed for comment in draft form and will be published in final form in the first quarter of 1991.

110. The Memorandum is reproduced in Annex IX of the Annual Report: Director of Investigation and Research, Combines Investigation Act for the year ended March 31, 1984 (Ottawa: Supply and Services Canada, 1984).